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In The

Supreme Court of the United States

SHIRLEY ROCKSTEAD, *et al.*,

Petitioners,

v.

CITY OF CRYSTAL LAKE,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, and historically has been, vitally concerned with judicial decisions regarding government regulation and taking of private property.

NAHB appeared before the Court as a petitioner in a case decided earlier this term concerning the Clean Water and Endangered Species Acts, *NAHB v. Defenders of Wildlife*, 551 U.S. ----, 127 S.Ct. 2518 (2007). It has also participated as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs. A list of those cases is attached as Appendix A to this brief.

NAHB has frequently asked this Court to clarify procedural and jurisdictional issues so Fifth Amendment takings claims can be resolved on their merits. Too often, ripeness principles are misapplied to operate as an unfair bar, denying land owners full and fair federal court access

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

on constitutional takings claims. NAHB thus offers its experience in this field and a national perspective to support the Petitioners.

SUMMARY OF ARGUMENT

This matter provides another opportunity for the Court to clarify the confusion regarding ripeness for claims under the Fifth Amendment's Takings Clause. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), established the rule that a takings claim does not become ripe for federal court adjudication until the aggrieved property owner pursues inverse condemnation litigation in state court. Four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), stated that this state-litigation rule "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim. *Id.* at 348-349 (Rehnquist, C.J., concurring). The *San Remo* concurring Justices believed that *Williamson's* "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351.

The court of appeals' decision provides the opportunity "revisit" the "real anomalies" created by *Williamson.* The state-litigation rule has been thoroughly aired in the lower federal and state courts. Postponing review will not contribute to resolution of the open questions generated by *Williamson*, inconsistencies within this Court's takings jurisprudence will linger, and conflicting lower court decisions will proliferate. Respectfully, NAHB encourages this Court to grant the petition, reconsider the state-litigation element of *Williamson*'s ripeness doctrine — and dispense with it.

ARGUMENT

I. THE PETITION PROVIDES AN APPROPRIATE VEHICLE TO RECONSIDER THE STATE-LITIGATION RULE.

A. *Williamson:* The State-Litigation Rule.

"There are two independent prudential hurdles" to ripen a takings claim. *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733-34 (1997). These were established in *Williamson.* First, takings claims are not ripe "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson,* 473 U.S. at 191. This "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 193. The finality requirement is not at issue.

Williamson's second ripeness requirement is called into question here: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo,* the late Chief Justice Rehnquist, joined by former Justice O'Connor and Justices Kennedy and Thomas, labeled this requirement the "state-litigation rule." *San Remo,* 545 U.S. at 349, (Rehnquist, C.J., concurring). They described the rule as follows: "Until the claimant had received a final decision of compensation through all available state procedures, such as by an inverse condemnation action ... he 'could not claim a violation of the Just Compensation

Clause.'" *Id.* at 349 (citing *Williamson*, 473 U.S. at 195-196).

B. *San Remo:* The State-Litigation Rule Meets Issue Preclusion.

San Remo did not directly address the validity of the state-litigation rule. Rather, the question was whether a takings claimant, in initial state litigation, could reserve a Fifth Amendment claim for subsequent federal adjudication. *San Remo* ruled that such a reservation was inappropriate, resolving a circuit split on that point. *Id.* at 337-338. The Court further held it was "not free to disregard the full faith and credit statute [28 U.S.C. § 1731] solely to preserve the availability of a federal forum" after initial state litigation mandated by *Williamson*. *Id.* at 347. Issue preclusion was thus held to bar relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment" — even if a takings plaintiff "would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* at 342.

The *San Remo* concurrence was concerned that the Court's holding regarding issue preclusion "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *Id.* at 351 (Rehnquist, C.J., concurring).[2] Takings law experts have put the problem this way:

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[2] This is exactly what has transpired. By the mid-1990s, the lower federal courts overwhelmingly invoked the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. See John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings*

> [A]s a reward for following the rules and trying to ripen their federal claims in state court as spelled out by *Williamson County,* property owners have the rug yanked out from under them by federal courts saying the door to that courthouse is now closed, because the very act of "ripening" the case actually sounded its death knell.

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases At Long Last Reaches The Self-Parody Stage,* 36 Urb. Law. 671, 687 (Fall 2004). The preclusive effect of state takings decisions, causing the virtual wholesale relinquishment of jurisdiction by the federal courts over Fifth Amendment takings claims, prompted the *San Remo* concurring Justices to question the state-litigation rule's propriety. They wrote it was not "clear" that *Williamson* "was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo,* 545 U.S. at 349 (Rehnquist, C.J., concurring). The concurrence doubted

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Plaintiffs can Enter the Federal Courthouse, 31 Urb. Law. 195, 203-205 (Spring 1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits." Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop., House Judiciary Comm., 105th Cong. 67 (1997) *reprinted in* 31 Urb. Law. 234, 236 (Summer 1999) (testimony of Prof. Daniel Mandelker).

that "either constitutional or prudential principles" should first require exhaustion of all state compensation procedures before a claimant can vindicate Fifth Amendment rights. *Id.* The concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351.[3]

C. The State-Litigation Rule was Essential to the Court of Appeals' Decision Below.

The decision below provides a text book example of *Williamson*'s effect in barring federal courts from deciding Fifth Amendment takings claims on their merits. Here, Petitioners' parcel is adjacent to stormwater detention ponds and wastewater treatment facilities owned by the city. The city's management of these features caused periodic flooding on Petitioners' property, thereby converting "productive farmland into worthless wetlands." Pet. App. 3a. Since 1948, Illinois case law has held that an inverse condemnation suit will not lie for damages from "intermittent flooding," and Petitioners thus lost their case at the state trial level. Pet. App. 3a (citing *People ex rel. Pratt v. Rosenfeld,* 77 N.E.2d 697, 699-700 (Ill. 1948)).

No further appeals were sought in the Illinois courts because Petitioners saw "no point in continuing in state

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[3] The lower courts would agree. See, *e.g., Kottschade v. City of Rochester,* 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied,* 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

court because the outcome is foreordained by state law." Pet. App. 4a. So, they filed a Fifth Amendment takings suit in federal court. The court of appeals, however, deemed the suit unripe under *Williamson*. Writing for the court, Judge Posner decided that further pursuit of state appeals could still provide a light at the end of the tunnel because judges "can — and do — change common law doctrines." *Ibid.* The court of appeals saw a "glimmering of recognition" provided by a single 1994 state intermediate appellate decision that Illinois law could, after all of these years, change course to recognize an inverse condemnation claim due to intermittent flooding. Pet. App. 6a. (citing *Luperini v. County of DuPage,* 637 N.E.2d 1264 (Ill. App. 1994)). Judge Posner thus concluded that the district court properly dismissed Petitioners' federal takings claim because they did not pursue state litigation to its ultimate appellate conclusion. Pet. App. 9a-10a.

In the entire, tortured history of post-*Williamson* cases, the court of appeals' decision is among the more extreme. Until now, no circuit has so harshly decided that the state-litigation rule compels takings claimants to pursue all levels of appeals up through and including a state supreme court (assuming the state supreme court accepts the case under its own rules for *certiorari* review). And, Judge Posner's decision requires takings claimants to possess predictive powers and/or incredible luck, in the hope that a state's highest court might possibly reverse earlier, long-standing precedent. For, if a takings plaintiff does not pursue state litigation and appeals at all levels of the state system, they will never have the merits of their Fifth Amendment claim decided by *any* court. As Judge Posner stated, if "the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit" due to *res judicata* and the doctrine against claim splitting. Pet. App.

9a. In other words, [t]he litigation in state court is the end of the road" for property owners bringing Fifth Amendment claims. *Ibid.*

Thus, the court of appeals held that: (1) *Williamson requires* federal takings claims to be filed in state court; and (2) that claim will *never* be heard in federal court, because *res judicata* would preclude federal adjudication. If this Court agrees with the court of appeals' reading of *Williamson* – that the lower federal courts are effectively barred from deciding the merits of cases arising under the Takings Clause – then it needs to announce that radical notion once and for all, in clear and unmistakable terms.

If Judge Posner's conclusion is correct, then the only cases in which lower federal courts are available to decide takings claims occur when the United States is sued and the amount in controversy exceeds $10,000. In that narrow set of cases, 28 U.S.C. § 1491(a) confers jurisdiction on the Court of Federal Claims and the Federal Circuit has appellate review. See, *e.g.*, *John R. Sand & Gravel Co. v. United States,* 457 F.3d 1345 (Fed. Cir. 2006), *cert. granted,* 75 U.S.L.W. 3474 (U.S. May 29, 2007) (No. 06-1164). Otherwise, the *only* other federal court that will substantively interpret the Takings Clause is *this* Court, when it elects to grant *certiorari* from the decision of a state's highest court. Thus, the federal district courts and circuit courts of appeals are divested from analysis of a Bill of Rights provision. They are deprived the opportunity to serve as laboratories for Fifth Amendment study, as the Takings Clause has become the virtual exclusive domain of state courts.

This cannot be right. "[A] case containing claims that local administrative action violates federal law ... is within

the jurisdiction of the federal district courts." *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156-163 (1997). With respect, the Court should grant *certiorari* to reverse the court of appeals.

D. Unlike *San Remo,* This Case Squarely Questions the Validity of the State-Litigation Rule.

The state-litigation rule's validity was not directly put to the Court in *San Remo*, as it is in the case at bench. In *San Remo,* many *amici* (including NAHB) urged the Court to directly confront *Williamson.* But the invitation was declined because "no court below ha[d] addressed the correctness of *Williamson County,* neither party ha[d] asked us to reconsider it, and resolving the issue could not [have] benefit[ed] petitioners." *Id. San Remo,* 545 U.S. at 352. (Rehnquist, C.J., concurring). The converse is true here. First, the court of appeals *did* consider *Williamson*'s impact (Pet. App. 4a-5a; 9a-10a), and second, one of the petition's questions plainly asks the Court to reconsider the state-litigation rule.

Third, resolving the issue would benefit Petitioners. If the Court reconsiders the state-litigation rule and removes it from the ripeness landscape, Petitioners would receive a federal adjudication on the merits of their physical takings claim arising from intermittent but recurring floods – which they can not obtain in state court, because Illinois's well-settled law allows compensation only for permanent flooding. Pet. App. 6a-8a. But see *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 657 (1981) (Brennan, J., plurality dissent) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less

obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent, irreversible 'takings'"); *United States v. Cress,* 243 U.S. 316, 328 (1917) ("the right to compensation must arise" whether inundation is "permanent" or "intermittent but inevitably recurring").

In short, this is an "appropriate case" to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo,* 545 U.S. at 352 (Rehnquist, C.J., concurring).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONTRADICTIONS IN THIS COURT'S TAKINGS CASES AND CONFLICTS IN THE LOWER COURTS — ALL ARISING FROM THE STATE-LITIGATION RULE.

The *San Remo* concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351. Those anomalies include contradictions within this Court's own takings decisions as well as divisions among the circuit courts.

A. Contradictions in This Court's Takings Cases.

1. Conflict Between *Williamson* and *San Remo.* Tension is especially pronounced between *Williamson* and *San Remo.* The *Williamson* Court stated that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s], its takings claim is *premature.*" *Williamson,*

473 U.S. at 197 (emphasis supplied).[4] Virtually every court of appeals has interpreted this language to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation.[5] Many commentators also read *Williamson* as providing the opportunity for ultimate federal adjudication following denial of compensation in state court.[6]

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[4] See also *Williamson,* 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so") (emphasis supplied); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available state] procedure and been denied just compensation") (emphasis supplied). *id.*

[5] *Deniz v. Mun. of Guaynabo,* 285 F.3d 142, 146 (1st Cir. 2002); *Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 99-100 (2d Cir. 1992), *cert denied,* 507 U.S. 987 (1993); *County Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 168 (3d Cir. 2006); *Henry v. Jefferson County Planning Comm'n,* 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas,* 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair,* 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex,* 199 F.3d 363, 368-73 (7th Cir. 2000); *Kottschade v. City of Rochester,* 319 F.3d 1038, 1041(8th Cir.), *cert. denied,* 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied,* 523 U.S. 1059 (1998); *Bateman v. City of W. Bountiful,* 89 F.3d 704, 708-09 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County,* 195 F.3d 1225, 1234 (11th Cir. 1999), *cert denied,* 531 U.S. 815 (2000).

[6] See, *e.g.,* Steven J. Eagle, *Regulatory Takings,* 1062, 2d ed. (2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the

The Court's opinion in *San Remo*, however, upends this widespread understanding. It declared that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 545 U.S. at 346 (citing *Williamson,* 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? Are *Williamson* and *San Remo* reconcilable, or in hopeless conflict? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until after the state denies compensation? How would the process of bringing simultaneous claims work? Should the state and federal takings claims be brought in state court sequentially, in that order? Are they part of the same, or separate, lawsuits?

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state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, cited *supra* n. 5, which have been virtually unanimous that they lack jurisdiction over Fifth Amendment takings claims until after state litigation is over? Are these opinions now overruled?

The petition should be granted so the Court can clarify the apparent contradictions between *Williamson*'s rule that state litigation is a condition precedent to ripen a federal takings claim, and *San Remo*'s rule that federal and state takings cases can be brought simultaneously in state court.

2. Conflict With This Court's Decision on Removal Jurisdiction in *City of Chicago.* Another anomaly is that the state-litigation rule is irreconcilable with *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 528-529. Under the federal removal statute,[7] a case can be removed from state to federal court only if it could have been brought in federal court *originally*.

Therein, the seeds of more conflict are sown. Under *Williamson,* federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until

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[7] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant ... to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

the property owner brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago,* federal courts *do* have original jurisdiction over federal takings claims because a municipality has the right to remove them to federal court. The upshot is that federal courts decide federal takings claims only at the whim of municipal defendants who decide to exercise their removal option. The petition should be granted to address the dilemma created by *Williamson, San Remo,* and *City of Chicago,* as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

3. Conflict With This Court's Decision on Seventh Amendment Rights in *Del Monte Dunes.* The state-litigation rule also generates friction with *City of Monterey v. Del Monte Dunes,* 526 U.S. 687 (1999). There, this Court held that takings plaintiffs in Section 1983 litigation have a Seventh Amendment right to a jury trial on issues of government liability. That is in stark contrast to the practice in state courts generally, which do not submit takings liability issues to juries. *Id.* at 719. Indeed, here the Petitioners did not receive a jury trial on whether their claim for intermittent but recurring flooding rendered Respondent liable to pay just compensation. If *Williamson* truly compels state litigation to ripen Fifth Amendment claims, and *San Remo* allows simultaneous litigation of federal and state takings claims in state court, then the Seventh Amendment rights confirmed by *Del Monte Dunes* are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights to apply to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes,* 526 U.S. at 719. This Court's attention is needed to ensure that the state-litigation rule does not abrogate Seventh Amendment rights guaranteed by the United States Constitution.

B. Conflict in the Circuit Courts.

1. Circuit Conflict on Claim Preclusion. *San Remo*'s holding is arguably limited to issue preclusion or collateral estoppel,[8] but the language in the Court's opinion is broad enough to encompass claim preclusion or *res judicata* as well.[9] In any event, there is a circuit conflict as to whether the state-litigation rule triggers *res judicata* to bar subsequent federal takings claims. While not citing *San Remo,* in the case at bench the court of appeals stated that the rule against claim splitting applies, "thus barring by virtue of the doctrine of res judicata a subsequent suit filed

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[8] See *San Remo,* 545 U.S. at 342 ("The relevant question ... is whether the state court actually decided an issue of fact or law that was necessary to its judgment"); *id.* at 343 ("... we are presently concerned only with issues actually decided by the state court[s] that are dispositive of federal claims raised under § 1983").

[9] *Id.* at 336 (full faith and credit statute "has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion'"); *id.* at 344 (federal courts may not "simply create exceptions" to full faith and credit statute and "depart[ ] from traditional rules of preclusion") (citations omitted).

under federal law." Pet. App. 9a. The Seventh Circuit thus joined the Third and Tenth Circuits in extending claim preclusion to bar subsequent federal takings claims after mandatory state proceedings have resulted in the denial of compensation under state law.[10] The Second, Sixth, and Ninth Circuits disagree. They have decided that compelled resort to state court under *Williamson* does not extinguish Fifth Amendment claims subsequently filed in federal court.[11] As the Sixth Circuit observed in rejecting a claim preclusion defense: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc.*, 381 F.3d at 521.

Significantly, the Ninth Circuit has plainly distinguished between issue and claim preclusion in the context of the state-litigation rule. In *San Remo*, 364 F.3d 1088, 1096 (9th Cir. 2004), it invoked *issue* preclusion to bar relitigation in subsequent federal proceedings, and this Court affirmed, 545 U.S. 323 (2005). But in *Dodd*, 59 F.3d at 869-70, the Ninth Circuit refused to deal the *claim* preclusion card:

> [To] hold that a takings plaintiff must first present a Fifth Amendment *claim* to the state court system ...

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[10] See *Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998).

[11] See *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), overruled as to issue preclusion and claim reservation by *San Remo*, 545 U.S. at 342; *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

> would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result. (Emphasis supplied.)

The circuits thus disagree on the application of claim preclusion following *Williamson* state proceedings, and this Court should intervene.

2. Circuit Conflict on Removal Jurisdiction. As discussed *supra* pp. 13-14, *City of Chicago* allows a municipal defendant to remove a takings case to federal court after a plaintiff's initial state filing. However, the lower courts are split on whether they have jurisdiction to decide Fifth Amendment takings claims that have been so removed. The Seventh Circuit, on remand in *City of Chicago,* decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit has held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court, precisely because no original state proceedings ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court — and then argue for dismissal because *Williamson*'s state-litigation rule went unsatisfied. The Fifth Circuit rewarded the city for its chutzpah by dismissing the case. See *Sandy*

Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" lie at the heart of the Takings Clause. *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. The circuits are split on how to handle removed takings cases, and this Court should address the conflict.

3. Circuit Conflict on Application of State-Litigation Rule to Other Constitutional Claims. The lower federal courts also clash on whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. Some circuits restrict *Williamson*'s state remedies requirement to takings claims only.[12] However, the Seventh Circuit, in parsing a land owner's § 1983 claims, held that *Williamson* state procedures apply to takings and due process, but not equal protection. See *Forseth v. Vill.*

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[12] See, *e.g., County Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley,* 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal,* 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall,* 112 F.3d 313, 317 (8th Cir. 1997).

of Sussex, 199 F.3d 363, 370-71 (7th Cir. 2000). The First Circuit has held that state inverse condemnation claims must be exhausted for *both* federal takings and due process claims, without opining on equal protection. See *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). The Second Circuit has extended *Williamson* to its outer limits, requiring ripening state litigation for all three types of claims. See *Dougherty v. Town of No. Hempstead Bd. of Zoning App.*, 282 F.3d 83, 88 (2d Cir. 2002).

The Tenth Circuit has issued two, irreconcilable rulings on this point. It has applied *Williamson*'s state-litigation rule to takings and procedural due process claims brought under § 1983. See *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1992). Yet it has also ruled that the state-litigation rule is *not* applicable to any claims sounding in takings, due process, or equal protection, because a plaintiff "need not exhaust his available administrative remedies prior to filing a § 1983 action ...." See *Bateman v. City of West Bountiful*, 89 F.3d 704, 708 (10th Cir. 1996). This Court should grant the petition to provide guidance on whether the state-litigation rule encompasses due process and equal protection, as well as takings, claims.

CONCLUSION

The Court should no longer delay its reconsideration of the state-litigation rule. When *Williamson* was decided in 1985, this Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson*, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of

the Fifth Amendment's substantive protections have become somewhat more defined, but the most basic, fundamental jurisdictional question — "Can a federal court ever decide a federal takings claim?" — remains undeciphered. This is a question of overwhelming constitutional importance.

For the foregoing reasons, the petition should be granted.

August 22, 2007

Respectfully Submitted,

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APPENDIX A

Cases in which NAHB has participated as an *amicus curiae* or "of counsel" before this Court include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006); *Rapanos v. United States*, 126 S.Ct. 2208 (2006); and *John R. Sand and Gravel Co. v. United States*, No. 06-1164 (U.S. *cert.* granted May 29, 2007).